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October 3, 2006

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 9, 2006

Case Number: TSO-0397

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

On March 29, 2006, the DOE issued a notification letter to the individual. Attached to the notification letter was a statement entitled "Information creating a substantial doubt regarding eligibility for an Access Authorization." (hereinafter referred to as the "information statement"). The information statement lists three alcohol related incidents. First, as a part of a regular random employee alcohol and drug screening program the individual was tested in July 2005. That test indicated a breath alcohol concentration (BAC) of .047. The second incident occurred in December 2000 when the individual was arrested for driving with a BAC of .08. The third incident took place in 1991 when the individual was a college student. While he was walking to his dormitory, the campus police issued him a warning for being "too intoxicated to respond to police orders." Tr. at 153.

The information statement indicates that a DOE consulting psychologist evaluated the individual and determined that he uses alcohol habitually to excess. DOE Exhibit #8. The notification letter finds that the alcohol incidents and the finding of a DOE consulting psychiatrist create a security concern under Criterion J. 10 C.F.R. §710.8(j).

The notification letter informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

At the hearing the individual was represented by counsel. In his opening statement the counsel indicated that the individual agrees with the facts and conclusion in the DOE consulting psychologist's January 12, 2006 report. He indicated that he would present the testimony of the individual, his friends, family and his counselor that corroborate that the individual has been abstinent from alcohol since July 2005 and has actively participated in a rehabilitation program. He believes that these steps mitigate the DOE security concern. Transcript of Hearing (Tr.) at 9. At the hearing the DOE presented the testimony of the DOE consulting psychologist. Below is a summary of the testimony at the hearing.

## II. HEARING

### A. The Individual

The individual testified that on July 14, 2005 he took a random alcohol screening test which showed a .047 BAC reading. He explained that on the evening of July 13, he had gone to a bar with a friend. They continued to consume alcohol until 3 A.M. He reported for work the next morning at 7:00 AM. Tr. at 17. He testified that when he reported to work he had a hangover but did not believe he was intoxicated. Tr. at 17.

The individual stated that as a result of the positive BAC reading, he was suspended from his job for 30 days. In addition, he was required to participate in a rehabilitation program and to submit to 26 random alcohol tests in the next 12 months. Tr. at 21. The testimony of the individual regarding those requirements is documented in two interoffice memorandums to the individual. A July 14, 2005 memorandum to the individual is individual's exhibit #6 and an August 16, 2006 memorandum to the individual is individual's exhibit #1.

The individual testified that shortly after his suspension he was referred to a rehabilitation program. Tr. at 22. After his initial evaluation he attended 10 group counseling sessions. Tr. at 23. The sessions focused on providing information about problems related to alcohol, and strategies to effectively deal with those problems. Tr. at 24. Individual's exhibit #3 is an October 31, 2005 certification of program completion.

The individual testified that he has seen the employee assistance program (EAP) counselor on a monthly basis since July 2005. Tr. at 27. In addition to his monthly visits, he also calls and e-mails the EAP counselor to update her on his situation. Tr. at 28. The individual testified that he took all requested BAC tests during the 12 months following his positive BAC test and that none of the tests indicated that he had consumed any alcohol. Tr. at 30.

The individual testified that his last drink was on July 13, 2005. Tr. at 35. He believes his friends and family are aware of his problem with alcohol and they have supported his decision not to consume alcohol. Tr. at 39. Since he stopped consuming alcohol, the individual feels that he has been "more engaged with my wife . . . I'm starting my masters in the fall. I've been a referee in football. I've probably been a little more active in other activities. Tr. at 56.

He testified that he understands that alcohol has caused serious problems in his life and that consumption of alcohol in the future is not in his best interest. Tr. at 58. He testified:

I really don't think alcohol is going to be a factor in my life anymore. I want to keep my job. I want to keep my wife. I want to pursue my career in the future. So alcohol can take a back seat as far as I'm concerned.

Tr. at 58. He concluded by stating that he does not intend to drink alcohol in the future. Tr. at 188.

#### B. The EAP Counselor

The EAP counselor stated that she has been a counselor at the site for 20 years. She met the individual on the day the individual tested positive for BAC. Tr. at 63. When she first spoke with the individual, he admitted he had a problem and took responsibility for causing the problem. Tr. at 64. She met monthly with the individual and she also communicated regularly with him by telephone and e-mails. During all of those communications she found the individual open and honest. Tr. at 68. She believes the individual has been abstinent since July 2005 and has had no difficulty maintaining his abstinence. Tr. at 68. She testified that all of the random alcohol tests performed by her office indicated that the individual had not consumed alcohol. Tr. at 68. She believes the individual is committed to abstinence and that there is a good chance the individual will not consume alcohol in the future. Tr. at 71.

#### C. The Individual's Wife

The individual's wife testified that she met the individual in 1998. Tr. at 112. They started living together in December 2001 and they were married in 2003. Tr. at 107. Because of a job opportunity, she moved to a city in another state (hereinafter new city) in October 2004. Tr. at 105. The individual moved to that city in March 2006. Tr. at 102. Between October 2004 and March 2006 she returned to their home city "every weekend or every other weekend." Tr. at 106.

The individual's wife testified that prior to the July 2005 positive alcohol test the individual drank an occasional beer or wine on the weekends. Tr. at 108. Prior to July 2005, she occasionally told the individual that he had consumed enough alcohol and he should not consume any more on that day. The last time she told the individual that he should not consume any additional alcohol was at a wedding they attended in 2004. Tr. at 109.

Since the individual moved to the new city, she is certain that the individual has not consumed any alcohol. Tr. at 110. She testified that

He's been very active. He's biking again. He didn't mention that he just did a bikeathon with the American Cancer Society, a 60-mile bike ride. He's been biking on base, and maybe every other Thursday, he's been playing soccer. I think he's been more motivated since he stopped drinking, and he's going back to school. We've been playing a lot of badminton, racquetball. We've been doing more positive activities together.

Tr. at 110. She believes that the individual has learned that alcohol consumption can cause him significant problems. Tr. at 114. She believes the individual has changed in the last year and that alcohol is no longer a part of his life. Tr. at 114.

### C. The Individual's Three Friends

The individual's first friend testified that he has known the individual since their college days in 1991. Tr. at 119. During their college years and prior to July 2005 he has seen the individual consume alcohol on numerous occasions. Those occasions were at social gatherings and were generally on the weekends. He testified that the individual rarely consumed alcohol during the week and he does not believe the individual ever consumed alcohol when he is alone. Tr. at 122. He testified that he has never seen the individual drink to a point at which he lost control Tr. at 122. He testified that prior to the individual's move to the new city in March 2006 he saw the individual on a weekly basis. Since the individual's March 2006 move, he has seen the individual approximately seven times. Tr. at 120. He indicated that he has not seen the individual consume alcohol since July 2005 and he testified that since that time the individual has been "very conscientious, you know, about his alcohol consumption, and I've been completely supportive of that." Tr. at 121.

The individual's first friend also testified that the individual told him:

his intention is to not (consume alcohol); is to focus on his responsibilities and his family and his wife and their new home, their new career. So I think [the individual] has a really – has a grasp on his future and all the positive things that go along with that.

Tr. at 124.

The individual's second friend testified that he has known the individual since their college days in 1992. Tr. at 133. He testified that prior to the July 2005, the individual primarily consumed alcohol at weekend social occasions. Tr. at 139. He indicated that prior to the individual's March 2006 move he saw the individual on numerous occasions, but since the move he has seen the individual on only two or three occasions. Tr. at 134. He testified that since July 2005 he has been in several social situations in which alcohol was being consumed and that the individual did not consume any alcohol. He testified that the individual's behavior and his statements have indicated that he "is done with [alcohol]." Tr. at 135.

The individual's third friend testified that he also has been a close friend of the individual since they met in college. Tr. at 159. He testified that he has seen the individual ten times since he moved in March 2006. Tr. at 161. He testified that alcohol was available at several of those occasions, but the individual did not consume any alcohol. Tr. at 162. The individual's third friend testified that the individual has not told him specifically that he will not consume alcohol in the future. However, he believes the individual's behavior indicates he has been serious in his efforts to stop consuming alcohol. He testified that he does not believe that "alcohol is in [the individual's] future." Tr. at 165.

### D. The Individual's co-worker

The individual's co-worker and friend testified that he has known the individual personally and professionally for 10 years. Tr. at 143. He initially learned of the individual's 30-day suspension from co-workers. When the individual returned to work after the suspension the individual confirmed that he had been suspended for a positive BAC. Tr. at 149. The individual's co-worker testified that since July he has

been to a number of office related social events at which alcohol was served. Tr. at 146. He testified that on those occasions the individual made it clear that he “wasn’t allowed to do anything like that [consume alcohol].” Tr. at 146.

#### E. The DOE Consulting Psychologist

The DOE consulting psychologist testified that during her interview with the individual his description of his alcohol consumption was consistent with the record in this proceeding. Tr. at 155. She indicated that his pre July 2005 alcohol consumption pattern indicated “a problem drinker and that there was a probability that he could have developed an [alcohol] dependence disorder.” Tr. at 156. She testified that during her interview the individual “definitely recognized that alcohol had caused him problems in the past and seemed to be very willing to keep going with the treatment that he’d already started with the [EAP] counselor. He did tell me his intention was that he was not going to drink again because it had caused him problems.” Tr. at 156.

The DOE consulting psychologist was then asked whether she believes that in January 2006 when she interviewed the individual he was rehabilitated. She testified that:

At the time I saw [the individual], this was in January [2006], he was in the midst of undergoing all of the rehabilitation that he has gone through, and so my answer was no, that there was not adequate evidence yet, and that he would need to complete the course set out by the [EAP counselor] and by the DOE in order for there to be adequate evidence.

Tr. at 169.

She was then asked after hearing the testimony at the hearing (August 2006) to give her opinion of the individual’s rehabilitation. She testified that

I think that he’s doing real well. I think that he has demonstrated a sincere desire not to drink and he has some real good motivations in his wife and his job, things that are very important to him. The people who have talked and who have seen him after work, even in situations where alcohol is served, and the people who have a history of drinking with him, are supportive, also, and seem to be saying that they don’t see that he is drinking. So my opinion at this point would be that he has met the standard – the standard that I would say would be enough for a rehabilitation or reformation diagnosis.

Tr. at 171.

### III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

#### A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 (1995).

#### B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

### IV. ANALYSIS

The individual's testimony indicates that he realizes that alcohol has caused problems in his life and that he has committed himself not to consume alcohol in the future. The testimony of the individual, his wife and friends convince me that the individual has not consumed alcohol since July 2005 and is committed to abstinence.

Further, the testimony indicates that the individual has actively participated in a rehabilitation program and has the support of his wife and his friends in his efforts to maintain his abstinence. Finally, the testimony of the DOE consulting psychologist supports the individual's position that he has achieved rehabilitation from his habitual use of alcohol to excess. I am therefore persuaded that he is unlikely to have alcohol-related problems in the future. For these reasons I find that he has mitigated the Criterion J security concern.

## V. CONCLUSION

I have concluded that the individual has mitigated the DOE security concerns under Criterion J of 10 C.F.R. § 710.8. In view of the record before me, I am persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker  
Hearing Officer  
Office of Hearings and Appeals

Date: October 3, 2006